90-427

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1989

BRUCE L. WHITE, JR., Petitioner

V.

ANTHONY M. FRANK,
U.S. POSTMASTER GENERAL,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals erred in affirming the dismissal of appellant's claim under the Age Discrimination in Employment Act (ADEA) 29 U.S.C. 633a. Appellant's claim of agediscrimination does not require that all administrative remedies be exhausted prior to filing a civil suit.

LIST OF ALL PARTIES TO THE PROCEEDINGS

BRUCE L. WHITE, JR.
Petitioner

ANTHONY M. FRANK,
U.S. POSTMASTER GENERAL
Respondent

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CITATION OF THE OPINIONS OF THE LOWER COURT

White v. Frank, 718 F.Supp. 592 (W.D.Tex. 1989)

White v. Frank, 895 F.2d. 243 (5th Cir. 1990)

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in the case of White v. Frank, 895 F.2d. 243(5th Cir. 1990) was entered on March 1, 1990. The jurisdiction of the Supreme Court is invoked under Rule 10.1(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

29 U.S.C. Sec. 633a (1989)

42 U.S.C. Sec. 2000e-16(c) (1989)

29 C.F.R. Sec. 1613.281 (1988)

29 C.F.R. Sec. 1613.282 (1988)

29 C.F.R. Sec. 1613.501 (1988)

29 C.F.R. Sec. 1613.513 (1988)

STATEMENT OF THE CASE

Petitioner alleged that he was discriminated against due to age and handicap under the Age Discrimination in Employment Act (ADEA), the Rehabilitation Act, the Veteran's Employment Act and 42 U.S.C. 1985(2) and (3). Petitioner is a former City Carrier of the Defendant's Austin Northeast station.

During his fourth month of employment he suffered an industrial accident that resulted in a back injury.

On the day petitioner was released to normal duties, he resigned, stating that his reason for his resignation was an opportunity for another job. Approximately seven (7) weeks later, Petitioner

applied for reinstatement as a postal service employee.

Petitioner was denied reinstatement on June 5,
1986. Petitioner was fifty-one (51) years of age at that time.

Postmaster Edwards sent a clarification of the reasons of dismissal on July 7, 1986. He maintained that due to petitioners poor performance it was not in the best interest of the Postal Service to reinstate Petitioner. Petitioner maintained that his performance was always satisfactory and that the postmaster's reasons were a mere pretext for age and physical handicap discrimination.

Petitioner filed a formal complaint of discrimination with the EEOC on August 4, 1986.

At a hearing on the complaint, an administrative judge found support for

petitioner's age discrimination complaint. On October 16, 1987 the Postal Service rejected the administrative judge's conclusions on age discrimination.

On November 9, 1987 the petitioner filed an appeal to the office of Review and Appeals of the EEOC. On December 22, 1987 the petitioner filed the present action in the United States district Court noting that the EEOC appeal was withdrawn from the EEOC's office of Review and Appeals.

Nonetheless, On March 30, 1988 the EEOC issue its finding confirming the decision of the Postal Service.

In August 1989 the United States District Court granted the government's motion for dismissal or in the alternative for summary judgment. The court held that the petitioner's ADEA claims were barred for failure to exhaust his administrative

remedies.

The United States Court of Appeals, Fifth Circuit, held that the petitioner must await the final agency decision before filing in federal district court.

ARGUMENT

The decision of the United States Court of Appeals in White v. Frank, 895 F.2d. 243 (5th Cir. 1990) is in direct conflict with the United States Court of Appeals decision in Langford v. Army Corps of Engineers, 839 F.2d. 1192 (6th Cir. 1988).

The United States Court of Appeals, Fifth Circuit, has failed to demonstrate how the court in Langford) erred in ruling that the exhaustion of administrative remedies was required under the Age Discrimination in Employment Act (ADEA). The regulations governing the ADEA clearly do not require such an interpretation.

The U.S. District Court's decision rested heavily upon the reasoning found in Purtill v. Harris, 658 F2d. 134 (3rd Cir.

1981).

In Purtill the petitioner alleged that he did not have to exhaust his administrative remedies because 180 days had passed since he filed his initial complaint. The court stated that..."were this a Title VII claim we would agree with his position because 42 U.S.C. 2000e-16(c) provides that a plaintiff may proceed to district court 180 days after filing a complaint with the EEOC. Conspicuously absent from the corresponding section of the ADEA, 29 U.S.C. 633a(c), is a similar provision allowing suit in the absence of a final decision by the EEOC. Although we have found no legislative history that reveals the reason why this difference exists, we are persuaded that it was intentional." Purtill, 658 F2d. at 138. Petitioner is also persuaded that it was an intentional difference; but a difference which would

allow petitioner to file suit prior to the exhaustion of remedies. Petitioner agrees with the court's reasoning in Langford that the absence in the ADEA of an exception to the rule of filing a civil suit as found under Civil Rights Act (i.e., allowed to file civil suit prior to final decision if 180 days have elapsed) does not mandate that an ADEA claimant must exhaust administrative remedies. The Civil Rights Act requires that there be final agency action before the filing of a suit. The ADEA does not require such a procedure. If the ADEA does not require such action why should it include an exception?

The District Court would have us believe that in every case where the ADEA does not address procedures which are outlined under the Civil Rights Act that this absence should be interpreted as

congressional intent that ADEA follow Civil Rights Act guidelines. Such an interpretation is without sound reasoning. One can only assume that congress knew of the contents of the Civil Rights Act and if they had intended similar provisions be incorporated into the ADEA they would have explicitly done so. They have chosen not to and this court should not now attempt to alter the congressional intent of enacting the ADEA by substituting it with the Civil Rights Act.

The District court found that the Sixth Circuit's citing of Paterson to be based upon a misreading of that case. However, Langford's reliance on Paterson is based upon it's holding with regard to the regulations which govern the ADEA.

ADEA regulations are clear and explicit. Sec. 633a(c) allows that any individ-

ual discriminated against due to age may bring an action in any Federal district court. Sec. 633a(d) states the requirements that an individual must comply with in order to file a civil suit if that same individual has not filed a complaint with the Commission. If Congress had intended there to be additional requirements prior to filing suit after an individual had filed a complaint they clearly had the opportunity to state so. They did not because they did not intend to follow the same guidelines required under Title VII. 29 C.F.R. 1613.501 contains the Equal Employment Opportunity Commission regulations on age discrimination. Sec. 1613.514 clearly states that Sec. 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. **[Sec. 1613.281 contains the statutory right to file a civil action**

after final agency action has taken place. Sec. 1613.282 requires the agency notify an employee of the right to sue.] Both Sec. 1613.281 and 1613.282 pertain to Title VII claims.

Interpretation of Title VII standards "sheds no light on congressional intent under the ADEA. Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866,872, 55 L.Ed.2d 40 (1978).

The court's reliance on the reasoning in Purtill completely ignores current and applicable regulations governing the ADEA.

The critical element in the analysis of the requirements of administrative exhaustion of all remedies is found in the amendment to 29 C.F.R. 1613.513 (1988). "Consistent with this view, the current EEOC regulations dealing with age-discrimination claims provide that the "filing of a civil action...terminates agency proc-

essing" of the matter. 29 C.F.R. 1613.513(1988). This regulation, however, applies only to court actions filed after November 30, 1987. Thus, the Langford view that exhaustion is not required even if the ADEA claimant has initiated administrative proceedings is undoubtedly correct for suits commenced after November 30, 1987, since otherwise the claimant who pursues both avenues would find both automatically closed." Bornholdt v. Brady, 869 F.2d. 57 (2nd Cir. 1989).

The present case was filed after November 30, 1987.

The court in Coleman v. Nolan, 693 F.Supp. 1544 (S.D. N.Y. 1988) supports the opinion of Langford. The defendant in that case attempted to apply procedural standards of Title VII to plaintiff's ADEA claims. The court held that there were too many critical differences in structure

and congressional intent between the two statutes.

The court stated that"...unlike Title VII, which requires an aggrieved federal employee to initiate administrative remedies...the ADEA allows a federal employee either to initiate administrative remedies or to file suit in federal court after filing a notice of intent to sue, see 29 U.S.C. 633a(b) & (d). Moreover, unlike section 2000e-16(c), which specifically provides that a plaintiff must exhaust administrative remedies unless certain exceptions are applicable, section 633a(c) does not require a plaintiff who initiates administrative remedies to exhaust those remedies before bringing suit in federal court. Most importantly, section 2000e16(c) clearly sets forth a thirty-day limitations period beginning with receipt of notice of final agency action, while

section 633a is silent as to the period in which a plaintiff who first pursued administrative remedies must commence a civil action." Coleman, 693 F.Supp. at 1547.

Therefore based upon the ADEA regulations the recent ruling by the Sixth Circuit was correct and appellant did not have to exhaust all of his administrative remedies and the dismissal of his claim under the ADEA by the Fifth Circuit was in error.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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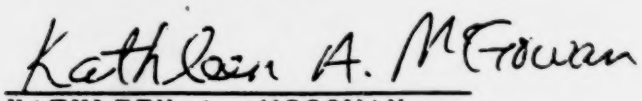

KATHLEEN A. MCGOWAN

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APPENDIX

Bruce L. WHITE, Jr.,
Plaintiff-Appellant,

v.

Anthony M. FRANK, U.S. Postmaster General, Defendant-Appellee

No. 89-1739
Summary Calendar

United States Court of Appeals
Fifth Circuit

March 1, 1990

Appeal from the United States District Court for the Western District of Texas.

PER CURIAM:

The plaintiff, Bruce White, challenges the refusal of the United States Postal Service to reinstate him following his resignation from that employer a few months previously. The instant suit alleges that the refusal to reinstate was on account of his race (Caucasian), color (white), handicap (20% disability and back injury), and age (50), in violation of Title VII of the Civil Rights Act of 1964,

as amended, 42 U.S.C. § 2000e, et seq.; §501 of the Rehabilitation Act; 29 U.S.C. § 791 et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.; and the Veterans Reemployment Act, 38 U.S.C. § 2021 et seq.

In a thorough and able opinion, the district court granted the defendant's motion to dismiss or in the alternative for summary judgment. White v. Frank, 718 F.Supp. 592 (W.D. Tex 1989). we are persuaded that the district court reached the correct result and for the right reasons. Accordingly, we affirm, and we addopt the district court's persuasive opinion.

In doing so, we of course adopt its holdings, and specifically (but without limitation) its holding 718 F.Supp. at 596-97 that an ADEA Plaintiff who chooses to appeal the employer's determination to

the Equal Employment Opportunity Commission (EEOC) must await final action by that agency before filing an action in federal district court. The district court noted, Id at 595, that at least three circuit courts of appeals1 have so held, leaving only one circuit2 to have held

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1 I.e., Castro v. United States, 755 F. Supp 399, 404 (1st Cir. 1985); Limongelli v. Postmaster General of the United States, 707 F.2d 368, 373 (9th Cir. 1983); Pruwitt v. Harris, 658 F.2d 134, 138 (3rd Cir. 1981), cert. denied, 462 U.S. 1131, 103 S.Ct. 3110, 77 L.Ed.2d 1365 (1983).

2 I.e., Langford v. United States Corps of Eng's, 839 F. 2d 1192, 1194-95 (6th Cir 1988). Another circuit now has commneded, in dictum, that under amended regulations plaintiffs who, like White, filed suit after November 30, 1987, were not required to wait until an administrative determination has been made. See Bornholdt v. Brady, 869 F.2d 57, 63 (2nd Cir. 1989). However, the instant plaintff in his reply brief on appeal specifically disavows reliance upon Bornholdt and the regulation in question, 52 Fed. Reg. 41, 922 (Oct. 30, 1987), providing that the "filing of a civil action...terminates [agency] processing" says nothing concerning the exhaustion

squarely to the contrary.

We acknowledge, as did the district court, that there has been some uncertainty on the matter in this circuit because of language in Patterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. May 1981), to the effect that "[a]fter the administrative complaint has been filed with the [EEOC], a civil action then may be instituted". However, the district court a quo has explained persuasivley, 718 F.Supp. at 596-97, why the quoted passage in Patterson is dictum, addressing a factual scenario not before the court. Moreover, it is not clear that the Paterson panel intended to imply that an EEOC complaint once filed would not also have to be ruled upon before a suit could be instituted. The district court also

convincingly shows, Id at 596, that the majority view is the better reading of the statutory scheme.

We also note that the passage in question from Paterson was quoted recently in Irwin v. Veterans Administration, 874 F.2d 1092, 1096 (5th Cir. 1989). Irwin involved a plaintff who had filed suit after receiving an adverse decision from the EEOC. Thus, the court did not comment upon the critical language from Paterson or address whether the plaintiff could have filed suit before the EEOC had made its determination. As in Paterson, the sentence is, at most, dictum.

Recently we have reiterated that when a panel of this court has opined on an issue not before it, "[we] do not view [such discussion] as precluding our consideration of the issue on the merits the first time it has been squarely

presented to us." Powell v. Commisioner, 891 F.2d 1167, 1172 (5th Cir, 1990). Directly presented now with issue, we conclude, as did the Ninth Circuit when faced with this issue, that "[t]o withdraw is to abandon one's claim, to fail is to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the court." Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9thCir. 1987), cert. denied, 486 U.S. 1009, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988).

Concluding that the district court correctly decided the issues presented to is, we AFFIRM.

Bruce L. WHITE
v.
Anthony M. FRANK
Civ. No. A-87-CA-877.

United States District Court,
W.D. Texas,
Austin Division

July 18, 1989
As Amended Aug. 3, 1989.

MEMORANDUM OPINION

NOWLIN, District Judge.

Before the Court is the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment. The Court having considered the Motion, as well as all of the responses and replies filed thereafter, in addition to all of the pleadings on file in this matter, is of the opinion that the Motion is meritorious and should be granted.1

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1 On July 7, 1989 the Court entered an Order granting the Defendant's motion, and stating that a more detailed opinion would be forthcoming. This is that opinion.

I. STANDARD OF REVIEW

The Defendant requests that the Court dismiss this action pursuant to Rule 12 (b)(6), or in the alternative, the Court grant summary judgment. A court should only dismiss a suit for failure to state a claim upon which relief may be granted when it appears beyond a doubt that there is no set of facts under which plaintiff could recover for the wrongs he alleges. Conley v. Gibson, 335 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2, L.Ed.2d 80 (1957).

As the Defendant notes, if a Court in reviewing a motion to dismiss pursuant to Rule 12(b)(6) finds the need to rely on evidence outside of the pleadings, the Court must treat the motion as a motion for summary judgment filed pursuant to Rule 56, and must apply the standards that go along with that rule. FED.R.CIV.P. 12(b); Stanely v. CIA, 639 F.2d 1146,

1157-58 (5th Cir. 1981).

Rule 56(b) permits the Court to grant a motion for summary judgment when it appears from the affidavits and other exhibits on file with the court that there is no genuine issue of material fact for trial, and when the movant is entitled to summary judgment as a matter of law. FED.R.CIV.P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion, and indulge all reasonable inferences in that party's favor. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir.1980).

The Supreme Court's 1986 summary judgment triology is by now well-known. In the three cases, the Court set out new rules governing the application of Rule

56. In the first case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d (1986), the Court discussed the difference between "material" and "immaterial" issues of fact. The Court stated that a "material" isssue is one that could affect the outcome of the suit under the applicable law. Id. at 248, 106 S.Ct. at 2510. The second case was Celotex Corp. v. Catrett, 477 U.S.317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). In that case, the Court held that a movant for summary judgment can prevail by showing that its opponent is unable to produce evidence in support of its claim and that no affidavits or other summary judgment evidence is necessary in such a situation. Id. at 322-24, 106 S.Ct. at 2552-53. Finally, in Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct.

1348, 89 L.Ed.2d 538 (1986), the Court held that when a movant produces a prima facie case, the opposing party must come forward with specific facts to show that there is a genuine issue for trial, or else summary judgment is proper. Id. at 587, 106 S.Ct. at 1356.

The Court's review of the Defendant's motion leads it to conclude that there are no material issues of fact remaining for trial, and that for the reasons set forth below, Defendant is entitled to judgment as a matter of law.

II. UNDISPUTED FACTS

In this suit, Plaintiff alleges that he was denied reinstatement as a postal employee because of his age and because of a handicap. Plaintiff attempts to raise these claims under the Age Discrimination in Employment Act, the Rehabilitation Act, the Veteran's Reemployment Act, and the

conspiracy provisions of 42 U.S.C. § 1985(2) and (3).

Based upon the Plaintiff's Complaint, and the uncontradicted summary judgment evidence submitted by the Defendant, the Court finds that the following facts are not in dispute: Plaintiff is a 30 year veteran of the United States Air Force in 1984, Plaintiff applied for and obtained a position with the United States Postal Service. He held that position from October 13, 1984 until March 31, 1985, when Plaintiff resigned his position to seek other employment. Plaintiff's resignation followed a two week absence from work resulting from a back injury received on the job. His resignation stated that he left the Postal Service to pursue an "oppurtunity on another job."

Plaintiff reapplied for a Postal Service position on September 20, 1985,

but was denied a position. No administrative complaint was ever filed for this denial. Thereafter, on May 23, 1986. Plaintiff again applied for reinstatement as a Postal Service employee. This request was again denied, on June 5, 1986. The Postmaster issued a clarification of the reasons supporting the denial on July 7, 1986. Plaintiff filed a formal complaint of discrimination on August 4, 1986, following an interview with a Postal Service Equal Employment Opportunity counselor. The complaint alleged that Plaintiff was denied reinstatement on the basis of his race, color, age and physical handicap.

A hearing was held on the complaint on April 30, 1987. The administrative judge found no basis for concluding that the plaintiff had been discriminated against on the basis of race, color or handicap,

but found support for the Plaintiff's age discrimination complaint, and recommended a finding of discrimination. The final Postal Service decision was handed down on October 16, 1987, and rejected the administrative judge's conclusions on age discrimination, finding that the Plaintiff's request for basis of the Plaintiff's age, color, race or handicap.

On November 9, 1987, the Plaintiff filed a timely appeal to the Equal Employment Opportunity Commission ("EEOC") Office of Review and Appeals. On December 22, 1987, prior to any decision by the EEOC, the Plaintiff filed this suit. On March 30, 1988, the EEOC issued its final decision, affirming the findings of the Postal Service, finding that the Plaintiff had failed to demonstrate a prima facie case of discrimination, and stating that there was not any credible evidence

supporting the Plaintiff's claims of discrimination.

III. LEGAL ANALYSIS

A. Exclusive jurisdiction

As noted earlier, the Plaintiff has filed this suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 633(a), the Rehabilitation Act of 1973, 29 U.S.C. Section 791, et seq., the Veterans Reemployment Act, 38 U.S.C. Section 2021, et seq. and the conspiracy provisions of the Civil Rights Act, 42 U.S.C. Sections 1985(2) and (3). The Defendant argues that the exclusive remedy for Plaintiff's alleged discrimination is the ADEA and the Rehabilitation Act. Several courts have held that a federal employee who claims age discrimination must proceed with the claim solely under the provisions of the ADEA, and that the ADEA provides the

exclusive remedy for such discrimination. See Patterson v. Weinberger, 644 F.2d 521, 524-25 (5th Cir. 1981). See also Castro v. United States, 775 F.2d 399, 404-405 (1st Cir. 1985); Purtill v. Harris, 658 F.2d 134, 137 (3rd Cir. 1981, cert. denied), 466 U.S. 1131, 103 S.Ct. 3110, 77 L.Ed. 2d 1365 (1983). The Fourth Circuit has recently reached the same conclusion in a non-federal employee situation. Zombro v. Baltimore City Police Department, 868 F.2d 1364, 1369 (4th Cir. 1989).

Thus, to the extent that the Plaintiff attempts to allege his age discrimination complaints pursuant to 42 U.S.C. Section 1985 or the Veterans Reemployment Act, the claims must be dismissed. Plaintiff's sole remedy for relief from any age discrimination is the ADEA.

The Defendant makes the same argument with the Plaintiff's handicap

discrimination complaint, claiming that the sole remedy available to Plaintiff is the Rehabilitation Act. See Prewitt v. United States Postal Service, 662 F.2d 292, 304 (5th Cir. 1981). Prewitt holds that a Plaintiff alleging a handicap discrimination claim may raise the claim under either Section 501 or Section 504 of the Rehabilitation Act. The Court need not address this issue however, because the Plaintiff's complaint does not state a claim for handicap discrimination under any statue other thant the Rehabilitation Act.

B. **Exhaustion of remedies.**

Both the ADEA and the Rehabilitation Act contain provisions relating to exhaustion of remedies but the provisions differ to some extent. The Defendant argues that the Plaintiff has failed to exhaust his remedies under either statues

and these claims should be dismissed on that basis.

I. ADEA

When a Plaintiff brings an action under the ADEA he has two choices regarding exhaustion of remedies. First, he can choose to bypass the administrative track entirely, and by giving notice in a timely fashion to the EEOC, he can head straight to federal court. See Patterson, 644 F.2d at 523-24; See also 29 U.S.C. Section 633a(d). His other option is to pursue his administrative remedies first. If he makes this choice, however, he must completely exhaust his adminstrative remedies before commencing suit in federal court. See Purtill, 658 F.2d at 138; Castro v. United States, 775 F.2d 399, 404 (1st Cir. 1985); Limnogelli v. Postmaster General of the United States, 707 F.2d 368, 373 (9th Cir. 1983). But see Langford v. U.S. Army Corp

of Engineers, 839 F.2d 1192, 1194-95 (6th Cir. 1988). Unlike the Title VII process (which is applicable to the Rehabilitation Act), an ADEA Plaintiff may not choose to abandon his administrative claims once he starts down that track. Purtill, 658 F.2d at 138.

With respect to Plaintiff's September 20, 1985 application, plaintiff never filed an administrative complaint. Thus, his action is proper only if he fulfilled the requirements of 29 U.S.C. Section 633a(d). That section requires that at least thirty (30) days prior to filing suit, the Plaintiff must give the EEOC notice of intent to sue. The notice must also be given no more than 180 days after the alleged unlawful practice occurred. No notice of intent to sue was ever served on the EEOC, and the suit was filed more than two years after the alleged unlawful

practice. Thus, with respect to the 1985 hiring decision, Plaintiff is barred from suing under the ADEA. 29 U.S.C. Section 633a(d).

With reference to the May 23, 1986 application, the plaintiff chose to follow the administrative process. He began that process by filing a formal appeal with the Postal Service. He pursued the matter further when he appealed the Postal Service's decision to the EEOC on November 9, 1987. On December 22, 1987, prior to any decision on the appeal, Plaintiff filed suit. The EEOC handed its decision down on March 30, 1988, affirming the Postal Service's findings, thus Plaintiff did not complete the administrative process prior to filing suit, and under the cases cited above, the ADEA claims related to the May 23, 1986 application must be dismissed.

Plaintiff argues that in Patterson, the Fifth Circuit held that an ADEA Plaintiff need not completely exhaust his adminstrative remedies prior to filing suit. He contends that an ADEA Plaintiff is free to file an action in federal court at any time after the administrative process is started, and that no final agency action is necessary. In support of this argument, he cites this statement from Patterson:

> "An employee who believes he has been discriminated against because of his age has two avenues of relief. He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is adverse to him, he may appeal to the Civil Service Commission 2 for administrative review. 29 U.S.C. Section 633a(b); See 29 C.F.R. Section 1613.501-1613.521 (1980). After the administrative

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2 The EEOC is now the Agency designated to hear such matters. See 92 Stat. 3781.

> complaint has been filed with the commission a civil action then may be instituted. 29 U.S.C. Section 633a(c),(d). Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the commission as long as such notice is give within 180 days after the alleged unlawful practice occurred". 29 U.S.C. Section 633a(d);See Hall v. United States, 436 F.Supp. 505 (D. Minn. 1977).

Patterson, 644 F.2d at 523-24 (footnote and emphasis added).

The Court does not agree that this statement supports the Plaintiff's argument. First, the language emphasized above is simply not supported by the language of 633a(c), and (d). Section 633a(d) says nothing about the suit being permitted any time after a complaint is filed with the EEOC. Rather, it states that the requirements of that section must be met when a complaint is not filed with

the Commission. 29 U.S.C. Section 633a (d). Further, Section 633a(c) does not even purport to address the requirements faced by a Plaintiff that alleged to pursue the EEOC remedies provided in 633a(b). To construe these sections as Plaintiff suggests would effectively read the EEOC provisions of 633a(b) out of the statue.

Moreover, the Patterson court stated that if a plaintiff elects to bypass the administrative process in part, he is still required to follow the dictates of 29 U.S.C. Seciton 633a(d). The only logical reading of the quote in part and language is that it applies to one (like plaintiff) who commences the administrative process, but does not complete it. As noted earlier, Section 633a(d) requires that the individual to give the EEOC notice of his intent to sue

and to give such notice within 180 days of the unlawful practice. Plaintiff has not complied with this section.3

Most importantly, the Fifth Circuit was not presented with the instant factual situation in Patterson. The issue there was whether the Plaintiff had adequately plead his claim under FED.R.CIV.P. 8(a)(2) to avoid a "facial attack" on jurisdiction, as opposed to a "factual attack". Patterson, 644 F.2d at 524. Indeed the court found that the Plaintiff had "exhausted all administrative channels then known to him", Id. at 522, and never discusses the scenario whether Plaintiff abandons the administrative process mid-

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3 Even if the court construed the Plaintiff's appeal to the EEOC to be the notice of intent to sue (which would be quite a liberal reading of the appeal), the appeal, filed November 9, 1987, was not filed within 180 days of the alleged unlawful practice, which occurred almost 18 months earlier, on June 5, 1986.

stream. At best, therefore, the portion of the court's statement is dicta, and this court is not bound by it.

As noted earlier, the First, Third and Ninth Circuits have explicitly held that when an ADEA Plaintiff commences the administrative process, he must completely pursue his administrative remedies prior to filing suit. Purtill, 658 F.2d at 134; Castro, 775 F.2d at 399; Limongelli, 707 F.2d at 373. As the Plaintiff notes, the Sixth Circuit has ruled to the contrary, and cited Patterson in support of that result. Langford, 839 F.2d at 1194-95. As is obvious from the above analysis, the Court finds the reasoning of Purtill, Castro and Limongelli more persuasive on this point and considers the Sixth Circuits citing of Patterson to be based upon a misreading of that case.

Thus the Court concludes that an ADEA

Plaintiff does not have the choice to abandon his administrative remedies once he has commenced that process, and the reasons for this rule are clear. If the Plaintiff chooses to start that process, it would be grossly inefficient to allow him to abandon it whenever he grows tired of it. For the EEOC procedures to work efffectively, and for the system to have intergrity, claimants must be required to pursue their administrative remedies to completion, or not pursue them at all. Because the Plaintiff failed to allow the administrative process to come to a conclusion prior to filing suit, his suit must be dismissed for failure to exhaust administrative remedies.

2. Rehabilitation Act

Claims brought under the Rehabilitation Act are governed by the administrative procedure sections of Title VII. 29

U.S.C. § 794a(a)(1); Prewitt, 662 F.2d at 303-304. The procedures for exhaustion of remedies have been set out by the EEOC in regulations. See 29 C.F.R. § 1613.211-1613. 283 (1988). These requirements include a strict exhaustion rule. Prewitt. 662 F.2d at 303-304. Among these regulations is the rule that if a plaintiff proceeds to an appeal before the EEOC Office of Review and Appeals, he may not file suit until 180 days after the appeal is filed. 29 C.F.R. § 1613.281(d).

As to the discrimination complaint regarding the September 20, 1985 application, no administrative complaint of any kind was ever filed. Thus, Plaintiff is barred from proceeding with this claim under the Rehabilitation Act. Prewitt, 662 F.2d at 303-304. See also Oaxaca v. Roscoe, 641 F.2d. 386 (5th Cir.1981); Bickham v. Miller, 584 F.2d 736

(5th Cir.1978).

As to the May 26, 1986 application, Plaintiff filed an appeal to the EEOC, Office of Review and Appeals on November 9, 1987. Prior to any decision by the EEOC, he filed this suit on December 22, 1987, well before the 180 day waiting period of 29 C.F.R. ¶ 1613.281(d) had elapsed. His suit is therefore premature, and must be dismissed. Moreover, the fact that Plaintiff's suit was on file when the 180 day period had passed does not cure the problem. To so hold would render meaningless the provisions of 29 C.F.R § 1613.281(d), creating the 180 day waiting period.

C. Veterans Reemployment Act

Plaintiff does not respond to the Defendant's arguments that the Veterans Reemployment Act ("VRA") is inapplicable to this case. It is clear that the VRA

claims are completely without merit. First, the Act specifically states that it applies to one's reemployment. See 38 U.S.C. § 2021, et seq. Thus, the VRA protects one's interest in his job if he leaves that job to enter the military service. There is, however, no allegation that the Plaintiff left the Postal Service to join the military. Indeed, the only allegation is that the Plaintiff left the Postal Service to seek "another opportunity", and it appears to be without dispute that the other opportunity was a civil service job. The VRA does not protect civil servants, but rather protects individuals that are drafted, enlist, or are called to active duty in the Armed Services. The VRA is thus wholly inapplicable to this case.

Further, even if the VRA applied in theory, on its face the Act is not

applicable to a veteran in the Plaintiff's situation. As the Complaint alleges, the Plaintiff served in the Air Force for a total of 30 years between 1953 and 1984. A veteran who enlisted or is called to active duty can only claim the Act's protection if "the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service...performed by such person after August 1, 1961, does not exceed five years..." 38 U.S.C. § 2024(a). Clearly the Plaintiff does not fall within the protection of the VRA, having served more than four years prior to 1961. The claims under the VRA must therefore be dismissed for failure to state a claim.

D. 42 U.S.C. § 1985(2) and (3)

Plaintiff's Complaint alleges that Defendant conspired to deny Plaintiff

reemployment as the result of Plaintiff's age, and that Defendant retaliated against Plaintiff for filing an EEOC complaint, in violation of 42 U.S.C § 1985. Both of these claims must be dismissed. The conspiracy claim for denial of equal protection based upon age discrimination must be dismissed because, as set out in section II.B, the ADEA is the Plaintiff's exclusive remedy for age discrimination. See Patterson, 644 F.2d at 524-25. The retaliation claim must be dismissed because the Pliantiff's own Complaint alleged that he did not file any EEOC complaint until after he was denied reemployment. It is thus impossible factually, legally, and in any other sense, for the Defendant's decision not to rehire Plaintiff to have been in retaliation for his filing of the EEOC complaint. These claims therefore fail to

state a claim.

IV. CONCLUSION

Under the undisputed facts it is clear the the Defendant is entitled to dismissal and summary judgment. The facts show that with respect to the claims under Veteran's Reemployment Act and 42 U.S.C. § 1985(2) and (3), the Complaint failed to state a claim upon which relief may be granted. With respect to the claims under the ADEA and the Rehabilitation Act, the Plaintff has failed to exhaust his administrative remedies, and summary judgment is therefore proper.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss or in the alternative, for Summary Judgment is GRANTED. An appropriate judgment be entered this date.

APPENDIX (iii)

29 U.S.C. 633a (a) - (d) (1989)

(a) Federal Agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the govern-

ment of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Libraries of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification. Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this

section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section.

The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to as subsection

(a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in federal employment on account of age. The head of each such department, agency, or unit shall comply with such rules,. regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commis-

sion but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdictions; relief Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimina-

tion of unlawful practices.

When the individual has not filed a complaint concerning age discrimination with the commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

42 U.S.C. Sec. 2000e-16

Discriminatory practices prohibited; employees or applicants for employment subject to coverage.

(a) All personnel actions affecting employees or applicants for employment (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Govern-

ment having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any

succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency or unit, as appropriate, shall be the defendant.

RIGHT TO FILE A CIVIL ACTION

29 C.F.R. 1613.281 Statutory right

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court:

(a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint.

(b) After one hundred and eighty (180) calendar days from the date of filing a complaint with the agency if there has been no decision.

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission, if there has

been no Commission decision.
For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in 1613.271(c)

29 C.F.R. 1613.282 Notice of right

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30 day time limit for filing, in any final action on a complaint under 1613.215, 1613.217, 1613.220, or 1613.221. The Commission shall notify an employee or applicant of his right to file

been no Commission decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in 1613.271(c)

29 C.F.R. 1613.282 Notice of cright

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30 day time limit for filing, in any final action on a complaint under 1613.215, 1613.217, 1613.220, or 1613.221. The Commission shall notify an employee or applicant of his right to file

a civil action, and of the 30-day time limit for filing, in any decision under 1613.234.

Subpart E--Nondiscrimination on Account of Age

29 C.F.R. 1613.501 Purpose and applicability

(a) Purpose. This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of age and the regulations under which an agency will process complaints of discrimination on account of age.

(b) Applicability. (1) This subpart applies (i) to military departments as defined in section 102 of Title 5, United States Code, and Executive agencies as defined in section 105 of Title 5, United States Code, the United States Postal Service and the Postal Rate Commission, and to the employees thereof, including employees paid from non-appropriated

funds, and (ii) to those units of the legislative and judicial branches of the Federal Government and the Government of the District of Columbia having positions in the competitive service and to the employees of those positions. (2) This subpart does not apply to aliens employed outside the limits of the United States. (3) except as provided by paragraph (b)(2) of this section, this subpart applies to applicants for positions to which paragraph (b)(1) of this section applies. (4) This subpart applies to employees and applicants for employment who are at least 40 years of age.

(c) Exceptions. Reasonable exemptions to the provisions of this subpart may be established by the Commission for each position for which Commission established a maximum age requirement on the basis of a determination that age is a bona fide

occupational qualification necessary to the performance of the duties of the position.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

29.C.F.R. 1613.513 Effect on Administrative Processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

29 C.F.R. 1613.514 Exclusions

Sections 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. The reference to 1613.281 in 1613.215, 1613.217, 1613.220, and 1613.221 may not be included in agency regulations required

by this subpart.

No.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1989

BRUCE L. WHITE, JR.,

Petitioner

V.

ANTHONY M. FRANK,

U.S. POSTMASTER GENERAL,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member

of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, he served the within Petition for Writ of Certiorari on the Counsel for Respondent by enclsoing a copy thereof in an envelope, with first-class postage prepaid, addressed to counsel of record at his address:

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and depositing same in the United States Post Office at San Antonio, Texas, on May 27, 1990 and further certifies that all parties required to be served have been served.

Dan A. Naranjo

DAN A. NARANJO

Counsel of Record

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-47

In the Supreme Court of the United States

OCTOBER TERM, 1990

BRUCE L. WHITE, JR., PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 29 C.F.R. 1613.513 permits a person who alleges discrimination on the basis of age in federal employment, and who chooses to pursue his administrative remedies before the EEOC, to obtain judicial review of his allegations without first exhausting his administrative remedies.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-47

BRUCE L. WHITE, JR., PETITIONER

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 24) is reported at 895 F.2d 243. The decision of the district court (Pet. App. 30) is reported at 718 F. Supp. 592.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1990. The petition for a writ of certiorari was filed on May 29, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] Because the appendices to the petition contain many typographical errors, including several omissions of significant language, we are reprinting the opinion of the court of appeals and the relevant portions of the district court opinion as appendices to this brief for the convenience of the Court.

STATEMENT

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, provides two separate routes by which a federal employee or an applicant for federal employment who believes he has been discriminated against because of his age can obtain relief. First, the aggrieved person may file an administrative claim in accordance with the rules and regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and the employing agency. 29 U.S.C. 633a(b). The person following this route first seeks counseling from an EEOC counselor at the employing agency. 29 C.F.R. 1613.213. If, after counseling, the matter cannot be resolved to the aggrieved person's satisfaction, he may file a formal complaint with the agency. 29 C.F.R. 1613.214.

If the agency denies the complaint, the complainant may then appeal to the EEOC. 29 C.F.R. 1613.215, 1613.231. After the administrative complaint is filed with the EEOC, the complainant may abandon the administrative process in favor of a civil suit. The filing of a civil action automatically terminates the processing of the administrative complaint. 29 C.F.R. 1613.513.[2]

Alternatively, the aggrieved person may bring a civil action in any federal district court of competent jurisdiction without pursuing his administrative remedies at all. The ADEA provides that "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this

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[2] The ADEA contains no express time limit for filing a suit for judicial relief after a complaint has been filed with the EEOC. 29 U.S.C. 633a(c).

section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C. 633a(d).

2. Petitioner was employed by the United States Postal Service for about five months before he resigned his job on March 31, 1985, to seek other employment. His first application for reinstatement with the post office—on September 20, 1985—was denied; petitioner did not seek review of this denial. On May 23, 1986, petitioner again applied for reinstatement; he was again denied employment on June 5, 1986. App., *infra*, 6a.[3]

Following an interview with a Postal Service Equal Employment Opportunity counselor, petitioner filed a formal complaint of discrimination on August 4, 1986. App., *infra*, 6a-7a.[4] After a hearing, an administrative law judge found no discrimination on the basis of race, color, or handicap, but recommended a finding of age discrimination; that recommendation was rejected by the Postal Service, which found that petitioner's reinstatement had not been denied on the basis of his age, color, race, or handicap. App., *infra*, 7a. On November 9, 1987, petitioner filed an appeal with the EEOC Office of Re-

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[3] The local postmaster subsequently explained that petitioner's poor performance during his original employment was the reason for the refusal to rehire him. Pet. 10.

[4] Although petitioner states that he "filed a formal complaint of discrimination with the EEOC on August 4, 1986" (Pet. 10), it appears that he filed his initial complaint properly with his agency. See 29 C.F.R. 1619.214 (initial complaint must be filed with the employee's agency, not with the EEOC).

view and Appeals; on December 22, 1987, before obtaining a ruling by the Commission, he filed a civil action in federal district court. App., *infra*, 7a. On March 30, 1988, the EEOC issued its final decision, affirming the decision of the Postal Service.

3. The district court granted respondent's motion for summary judgment on the ADEA claim.[5] It held that when an ADEA plaintiff chooses to pursue his administrative remedies, he must completely exhaust those remedies before commencing suit in federal court. Because petitioner had filed his suit before the EEOC acted on his appeal, he had failed to exhaust his administrative remedies; the district court therefore refused to consider petitioner's ADEA claim. App., *infra*, 9a-13a. The court of appeals affirmed, "[c]oncluding that the district court correctly decided the issues presented to [it]." App., *infra*, 4a.[6]

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[5] The district court also dismissed petitioner's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Section 501 of the Rehabilitation Act, 29 U.S.C. 791 *et seq.*, and the Veterans' Reemployment Act, 38 U.S.C. 2021 *et seq.* Pet. App. 49-55. Petitioner does not raise any issues relating to those claims in this Court.

[6] The court of appeals specifically agreed that "an ADEA plaintiff who chooses to appeal the employer's determination to the Equal Employment Opportunity Commission (EEOC) must await final action by that agency before filing an action in federal district court." App., *infra*, 2a.

ARGUMENT

1. Petitioner contends (Pet. 18) in this Court for the first time that "[t]he critical element in the analysis of the requirements of administrative exhaustion of all remedies is found in the amendment to 29 C.F.R. 1613.513 (1988)." This argument was not presented to the court of appeals.[7] This Court does not ordinarily address issues that have not been properly presented to the courts below. *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982). There is no reason to depart from that practice here.[8]

2. We do, however, agree with petitioner's analysis of the relevant law. There is no statutory or regulatory requirement that a complainant must seek administrative relief from the EEOC before filing suit under the ADEA. While the Act permits the EEOC to enforce the statutory anti-discrimination requirements, it also specifically provides for direct resort to a civil action. 29 U.S.C. 633a(d). Moreover, the Act directs the EEOC to issue rules and regulations governing the available administrative process, "as it deems necessary and appropriate." 29 U.S.C. 633a(b).

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[7] Indeed, in the court of appeals, petitioner "specifically disavow[ed] reliance upon" a recent Second Circuit decision, *Bornholdt* v. *Brady*, 869 F.2d 57, 63 (1989), which explained the significance of the amended regulation. App., *infra*, 2a-3a n.2. Petitioner apparently backs away from his disavowal before this Court, quoting *Bornholdt* at length in the petition. Pet. 18-19.

[8] Since the EEOC denied petitioner's administrative appeal on March 30, 1988, he has now exhausted his administrative remedies. There would accordingly seem to be no reason under the lower courts' analysis why petitioner could not now file a new civil action in district court. See note 2, *supra*.

The ADEA is silent on the precise question at issue here—whether a complainant who has filed an appeal with the EEOC may abandon that appeal before it has been decided and seek direct judicial review. But the EEOC has exercised its regulatory authority to provide the answer to that question. For civil actions, like this one, which are filed after November 30, 1987, 29 C.F.R. 1613.513 (1988) provides that such filing will terminate the processing of the administrative complaint.[9] This regulation clearly contemplates that a person who has filed a complaint with the EEOC may obtain judicial review of the merits of his claim by filing a civil action in district court before he has exhausted his administrative remedies, and the EEOC so interprets it.[10]

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[9] 29 C.F.R. 1613.513 (1988) reads:

> The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

Before its amendment on October 30, 1987 (52 Fed. Reg. 41,922), the provision was to the opposite effect:

> The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

[10] The court below noted in passing that the regulation "says nothing concerning the exhaustion requirement." App., *infra*, 3a n.2. Although that is technically correct, the regulation is evidently based on the assumption that the complainant who files a civil action before administrative review is completed will obtain judicial review on the merits in that action. Otherwise, the termination of administrative review would deprive him of any opportunity to obtain an adjudication on the merits. That is clearly not what the ADEA contemplates. See 29 U.S.C. 633a(c). Indeed, petitioner escapes this dilemma, under the interpretation of the courts below, only because the EEOC for some reason completed its administrative review after petitioner filed his civil action, in

The courts of appeals have been divided as to whether an ADEA complainant who has elected the administrative remedy scheme can nevertheless seek judicial review without completing the administrative process. Compare *Langford* v. *U.S. Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988) (exhaustion of administrative remedies not required); *Bornholdt* v. *Brady*, 869 F.2d 57, 63 (2d Cir. 1989) (same), with *Castro* v. *United States*, 775 F.2d 399 (1st Cir. 1985) (exhaustion required); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981) (same), cert. denied, 462 U.S. 1131 (1983). *Castro* and *Purtill* were, however, decided before the amendment of 29 C.F.R. 1613.513 (1988), when the filing of a civil action did not terminate EEOC processing of administrative claims. See note 9, *supra*. The reasoning of *Langford* and *Bornholdt* is consistent with the EEOC's interpretation of the amended regulation.

As noted, the issue of the application of 29 C.F.R. 1613.513 to this case was not presented to the courts below. In addition, petitioner is not foreclosed from seeking judicial review now that the administrative process has been completed. Accordingly, there is no need for this Court to consider the effect of the new EEOC regulation in the first instance.

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contravention of 29 C.F.R. 1613.513 (1988). See note 8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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AUGUST 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-1739

Summary Calendar

BRUCE L. WHITE, JR., PLAINTIFF-APPELLANT

v.

ANTHONY M. FRANK, U.S. Postmaster General, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

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March 1, 1990

Before WILLIAMS, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

The plaintiff, Bruce White, challenges the refusal of the United States Postal Service to reinstate him following his resignation from that employer a few months previously. The instant suit alleges that the refusal to reinstate was on account of his race (Caucasian), color (white), handicap (20% disability and back injury), and age (50), in violation of title VII

of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; § 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.; and the Veterans Reemployment Act, 38 U.S.C. § 2021 et seq.

In a thorough and able opinion, the district court granted the defendant's motion to dismiss or in the alternative for summary judgment. *White v. Frank*, 718 F.Supp. 592 (W.D.Tex.1989). We are persuaded that the district court reached the correct result and for the right reasons. Accordingly, we affirm, and we adopt the district court's persuasive opinion.

In doing so, we of course adopt its holdings, and specifically (but without limitation) its holding, 718 F.Supp. at 596-97, that an ADEA plaintiff who chooses to appeal the employer's determination to the Equal Employment Opportunity Commission (EEOC) must await final action by that agency before filing an action in federal district court. The district court noted, *id.* at 595, that at least three circuit courts of appeals [1] have so held, leaving only one circuit [2] to have held squarely to the contrary.

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[1] I.e., *Castro v. United States*, 775 F.2d 399, 404 (1st Cir. 1985); *Limongelli v. Postmaster General of the United States*, 707 F.2d 368, 373 (9th Cir. 1983); *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3110, 77 L.Ed.2d 1365 (1983).

[2] I.e., *Langford v. United States Corps of Eng'rs*, 839 F.2d 1192, 1194-95 (6th Cir. 1988). Another circuit now has commented, in dictum, that under amended regulations plaintiffs who, like White, filed suit after November 30, 1987, were not required to wait until an administrative determination has been made. *See Bornholdt v. Brady*, 869 F.2d 57, 63 (2d Cir. 1989). However, the instant plaintiff, in his reply brief on

We acknowledge, as did the district court, that there has been some uncertainty on the matter in this circuit because of language in *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981), to the effect that "[a]fter the administrative complaint has been filed with the [EEOC], a civil action then may be instituted." However, the district court *a quo* has explained persuasively, 718 F.Supp. at 596-97, why the quoted passage in *Paterson* is dictum, addressing a factual scenario not before the court. Moreover, it is not clear that the *Paterson* panel intended to imply that an EEOC complaint once filed would not also have to be *ruled upon* before a suit could be instituted. The district court also convincingly shows, *id.* at 596, that the majority view is the better reading of the statutory scheme.

We note that the passage in question from *Paterson* was quoted recently in *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir.1989). *Irwin* involved a plaintiff who had filed suit *after* receiving an adverse decision from the EEOC. Thus, the court did not comment upon the critical language from *Paterson* or address whether the plaintiff could have filed suit *before* the EEOC had made its determination. As in *Paterson*, the sentence is, at most, dictum.

Recently we have reiterated that when a panel of this court has opined on an issue not before it, "[w]e do not view [such discussion] as precluding our consideration of the issue on the merits the first time it has been squarely presented to us." *Powell v.*

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appeal, specifically disavows reliance upon *Bornholdt*, and the regulation in question, 52 Fed. Reg. 41,922 (Oct. 30, 1987), providing that "the filing of a civil action . . . terminates [agency] processing," says nothing concerning the exhaustion requirement.

Commissioner, 891 F.2d 1167, 1172 (5th Cir.1990). Directly presented now with the issue, we conclude, as did the Ninth Circuit when faced with this issue, that "[t]o withdraw is to abandon one's claim, to fail to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the courts." *Rivera v. United States Postal Serv.*, 830 F.2d 1037, 1039 (9th Cir.1987), *cert. denied*, 486 U.S. 1009, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988).

Concluding that the district court correctly decided the issues presented to it, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. TEXAS
AUSTIN DIVISION

Civ. No. A-87-CA-877

BRUCE L. WHITE

v.

ANTHONY M. FRANK

July 18, 1989

As Amended Aug. 3, 1989

MEMORANDUM OPINION

NOWLIN, District Judge.

Before the Court is the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment. The Court, having considered the Motion, as well as all of the responses and replies filed thereafter, in addition to all of the pleadings on file in this matter, is of the opinion that the Motion is meritorious and should be granted.[1]

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[1] On July 7, 1989 the Court entered an Order granting the Defendant's motion, and stating that a more detailed opinion would be forthcoming. This is that opinion.

II. UNDISPUTED FACTS

In this suit, Plaintiff alleges that he was denied reinstatement as a postal employee because of his age and because of a handicap. Plaintiff attempts to raise these claims under the Age Discrimination in Employment Act, the Rehabilitation Act, the Veteran's Reemployment Act, and the conspiracy provisions of 42 U.S.C. §§ 1985(2) and (3).

Based upon the Plaintiff's Complaint and the uncontradicted summary judgment evidence submitted by the Defendant, the Court finds that the following facts are not in dispute: Plaintiff is a 30 year veteran of the United States Air Force. After retiring from the Air Force in 1984, Plaintiff applied for and obtained a position with the United States Postal Service. He held that position from October 13, 1984 until March 31, 1985, when Plaintiff resigned his position to seek other employment. Plaintiff's resignation followed a two week absence from work resulting from a back injury received on the job. His resignation stated that he left the Postal Service to pursue an "opportunity on another job."

Plaintiff reapplied for a Postal Service position on September 20, 1985, but was denied a position. No administrative complaint was ever filed for this denial. Thereafter, on May 23, 1986, Plaintiff again applied for reinstatement as a Postal Service employee. This request was again denied, on June 5, 1986. The Postmaster issued a clarification of the reasons supporting the denial on July 7, 1986. Plaintiff filed a formal complaint of discrimination on August 4, 1986, following an interview with a Postal Service Equal Employment Opportunity counselor. The complaint alleged that Plaintiff was denied rein-

statement on the basis of his race, color, age and physical handicap.

A hearing was held on the complaint on April 30, 1987. The administrative judge found no basis for concluding that the plaintiff had been discriminated against on the basis of race, color or handicap, but found support for the Plaintiff's age discrimination complaint, and recommended a finding of discrimination. The final Postal Service decision was handed down on October 16, 1987, and rejected the administrative judge's conclusions on age discrimination, finding that the Plaintiff's request for reinstatement had not been denied on the basis of the Plaintiff's age, color, race or handicap.

On November 9, 1987, the Plaintiff filed a timely appeal to the Equal Employment Opportunity Commission ("EEOC") Office of Review and Appeals. On December 22, 1987, prior to any decision by the EEOC, the Plaintiff filed this suit. On March 30, 1988, the EEOC issued its final decision, affirming the findings of the Postal Service, finding that the Plaintiff had failed to demonstrate a *prima facie* case of discrimination, and stating that there was not any credible evidence supporting the Plaintiff's claims of discrimination.

III. LEGAL ANALYSIS

A. *Exclusive jurisdiction*

As noted earlier, the Plaintiff has filed this suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a, the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*, the Veterans Reemployment Act, 38 U.S.C. § 2021, *et seq.*, and the con-

spiracy provisions of the Civil Rights Act, 42 U.S.C. §§ 1985(2) and (3). The Defendant argues that the exclusive remedy for the Plaintiff's alleged discrimination is the ADEA and the Rehabilitation Act.

Several courts have held that a federal employee who claims age discrimination must proceed with this claim *solely* under the provisions of the ADEA, and that the ADEA provides the exclusive remedy for such discrimination. *See Paterson v. Weinberger*, 644 F.2d 521, 524-25 (5th Cir. 1981). *See also Castro v. United States*, 775 F.2d 399, 404-405 (1st Cir. 1985); *Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3110, 77 L.Ed.2d 1365 (1983). The Fourth Circuit has recently reached the same conclusion in a non-federal employee situation. *Zombro v. Baltimore City Police Department*, 868 F.2d 1364, 1369 (4th Cir.1989).

Thus, to the extent that the Plaintiff attempts to allege his age discrimination complaints pursuant to 42 U.S.C. § 1985 or the Veterans Reemployment Act, the claims must be dismissed. Plaintiff's sole remedy for relief from any age discrimination is the ADEA.

The Defendant makes the same argument with regard to Plaintiff's handicap discrimination complaints, claiming that the sole remedy available to Plaintiff is the Rehabilitation Act. *See Prewitt v. United States Postal Service*, 662 F.2d 202, 304 (5th Cir.1981). *Prewitt* holds that a Plaintiff alleging a handicap discrimination claim may raise that claim under either § 501 or § 504 of the Rehabilitation Act. The Court need not address this issue, however, because the Plaintiff's Complaint does not state a claim for handicap discrimination under any statute other than the Rehabilitation Act.

B. *Exhaustion of remedies*

Both the ADEA and Rehabilitation Act contain provisions related to exhaustion of remedies, but the provisions differ to some extent. The Defendant argues that the Plaintiff has failed to exhaust his remedies under either statute, and these claims should be dismissed on that basis.

1. ADEA

When a Plaintiff brings an action under the ADEA he has two choices regarding exhaustion of remedies. First, he can choose to by-pass the administrative track entirely, and by giving notice in a timely fashion to the EEOC, he can head straight to federal court. *See Paterson*, 644 F.2d at 523-24; *see also* 29 U.S.C. § 633a(d). His other option is to pursue his administrative remedies first. If he makes this choice, however, he must completely exhaust his administrative remedies before commencing suit in federal court. *See Purtill*, 658 F.2d at 138; *Castro v. United States*, 775 F.2d 399, 404 (1st Cir.1985); *Limongelli v. Postmaster General of the United States*, 707 F.2d 368, 373 (9th Cir. 1983). *But see Langford v. U.S. Army Corps of Engineers*, 839 F.2d 1192, 1194-95 (6th Cir.1988). Unlike the Title VII process (which is applicable to the Rehabilitation Act), an ADEA Plaintiff may not choose to abandon his administrative claims once he starts down that track. *Purtill*, 658 F.2d at 138.

With respect to the Plaintiff's September 20, 1985 application, Plaintiff never filed an administrative complaint. Thus, his action is proper only if he fulfilled the requirements of 29 U.S.C. § 633a(d). That section requires that at least 30 days prior to filing suit, the Plaintiff must give the EEOC notice

of intent to sue. The notice must also be given no more than 180 days after the alleged unlawful practice occurred. No notice of intent to sue was ever served on the EEOC, and the suit was filed more than two years after the alleged unlawful practice. Thus, with respect to the 1985 hiring decision, Plaintiff is barred from suing under the ADEA. 29 U.S.C. § 633a(d).

With reference to the May 23, 1986 application the Plaintiff chose to follow the administrative process. He began that process by filing a formal appeal with the Postal Service. He pursued the matter further when he appealed the Postal Service's decision to the EEOC on November 9, 1987. On December 22, 1987, prior to any decision on the appeal, Plaintiff filed suit in federal court. The EEOC handed its decision down on March 30, 1988, affirming the Postal Service's findings. Thus, Plaintiff did not complete the administrative process prior to filing suit, and under the cases cited above, the ADEA claims related to the May 23, 1986 application must be dismissed.

Plaintiff argues that in *Paterson* the Fifth Circuit held that an ADEA plaintiff need not completely exhaust his administrative remedies prior to filing suit. He contends that an ADEA plaintiff is free to file an action in federal court at any time after the administrative process is started, and that no final agency action is necessary. In support of this argument, he cites this statement from *Paterson*:

> An employee who believes that he has been discriminated against because of his age has two avenues of relief. He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is

> adverse to him, he may appeal to the Civil Service Commission [2] for administrative review. 29 U.S.C. § 633a(b); *see* 29 C.F.R. §§ 1613.501-1613.521 (1980). *After the administrative complaint has been filed with the Commission, a civil action then may be instituted. 29 U.S.C. § 633a(c), (d).* Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the Commission as long as such notice is given "within one hundred and eighty days after the alleged unlawful practice occurred." 29 U.S.C. § 633a(d); *see Hall v. United States*, 436 F. Supp. 505 (D.Minn.1977).

Peterson, 644 F.2d at 523-24 (footnote and emphasis added).

The Court does not agree that this statement supports the Plaintiff's argument. First, the language emphasized above is simply not supported by the language of §§ 633a(c) and (d). Section 633a(d) says nothing about suit being permitted anytime after a complaint is filed with the EEOC. Rather, it states that the requirements of that section must be met when a complaint *is not* filed with the Commission. 29 U.S.C. § 633a(d). Further, § 633a(c) does not even purport to address the requirements faced by a plaintiff that elects to pursue the EEOC remedies provided in § 633a(b). To construe these sections as Plaintiff suggests would effectively read the EEOC provisions of § 633a(b) out of the statute.

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[2] The EEOC is now the agency designated to hear such matters. *See* 92 Stat. 3781.

Moreover, the *Paterson* court stated that if a plaintiff elects to bypass the administrative process *in part*, he is still required to follow the dictates of 29 U.S.C. § 633a(d). The only logical reading of the "in part" language is that it applies to one (like Plaintiff) who commences the administrative process, but does not complete it. As noted earlier, § 633a(d) requires the individual to give the EEOC notice of his intent to sue, and to give such notice within 180 days of the alleged unlawful practice. Plaintiff has not complied with this section.[3]

Most importantly, the Fifth Circuit was not presented with the instant factual situation in *Paterson*. The issue there was whether the Plaintiff had adequately pled his claim under FED.R.CIV.P. 8(a)(2) to avoid a "facial attack" on jurisdiction, as opposed to a "factual attack." *Paterson*, 644 F.2d at 524. Indeed, the court found that the plaintiff had "exhausted all administrative channels then known to him," *id.* at 522, and never discusses a scenario where the Plaintiff abandons the administrative process mid-stream. At best, therefore, that portion of the court's statement emphasized above is *dicta*, and this Court is not bound by it.

As noted earlier, the First, Third and Ninth Circuits have explicitly held that when an ADEA plaintiff commences the administrative process, he must completely pursue his administrative remedies prior to filing suit. *Purtill*, 658 F.2d at 134; *Castro*, 775

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[3] Even if the Court construed the Plaintiff's appeal to the EEOC to be a notice of intent to sue (which would be quite a liberal reading of the appeal), the appeal, filed November 9, 1987, was not filed within 180 days of the alleged unlawful practice, which occurred almost 18 months earlier, on June 5, 1986.

F.2d at 399; *Limongelli*, 707 F.2d at 373. As the Plaintiff notes, the Sixth Circuit has ruled to the contrary, and cited *Paterson* in support of that result. *Langford*, 839 F.2d at 1194-95. As is obvious from the above analysis, the Court finds the reasoning of *Purtill*, *Castro* and *Limongelli* more persuasive on this point, and considers the Sixth Circuit's citing of *Paterson* to be based upon a misreading of that case.

Thus, the Court concludes that an ADEA Plaintiff does not have the choice to abandon his administrative remedies once he has commenced that process, and the reasons for this rule are clear. If the Plaintiff chooses to start that process, it would be grossly inefficient to allow him to abandon it whenever he grows tired of it. For the EEOC procedures to work effectively, and for the system to have integrity, claimants must be required to pursue their administrative remedies to completion, or not pursue them at all. Because the Plaintiff failed to allow the administrative process to come to a conclusion prior to filing suit, his suit must be dismissed for failure to exhaust administrative remedies.

* * * * *

IV. CONCLUSION

Under the undisputed facts it is clear that the Defendant is entitled to dismissal and summary judgment. The facts show that with respect to the claims under the Veteran's Reemployment Act and 42 U.S.C. § 1985(2) and (3), the Complaint fails to state a claim upon which relief may be granted. With respect to the claims under the ADEA and the Rehabilitation Act, the Plaintiff has failed to exhaust

his administrative remedies, and summary judgment is therefore proper.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss, or in the Alternative for Summary Judgment is GRANTED. An appropriate judgment will be entered this date.

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